

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

ELEM INDIAN COLONY OF POMO  
INDIANS,

Plaintiff,

v.

PACIFIC DEVELOPMENT PARTNERS X,  
LLC, et al.,

Defendants.

No. C 09-1044 CRB

**ORDER DENYING LEAVE TO FILE  
MOTION FOR RECONSIDERATION**

Defendants ask this Court to grant them leave to file a motion for reconsideration. Defendants rely on the grounds outlined in Local Rule 7-9(b)(2), which provides that such a motion for leave may be granted upon a showing of “[t]he emergence of new material facts or a change of law . . . .” Defendants argue that the Supreme Court’s opinion of April 27, 2010, in Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp., 130 S.Ct. 1758 (2010), dictates that the arbitrator’s decision be reversed.

Stolt-Nielsen dealt primarily with the issue of class arbitration where not all parties have agreed to participate in class arbitration. The Court noted that the parties agreed that the relevant contract was “silent on whether [it] permit[ted] or preclude[d] class arbitration.” Id. at 1770 (alteration in original). The Court went on to conclude that “[t]his stipulation left no room for an inquiry regarding the parties’ intent, and any inquiry into that settled question would have been outside the panel’s assigned task.” Id. Defendants rely on this language to

1 resurrect their argument regarding the stipulation entered into in this case. Defendants  
2 remind this Court that the parties agreed that the memorandum of understanding (“MOA”)  
3 approved by the Tribe’s executive committee on September 3, 2007, was essentially the same  
4 as the MOA that was executed on the following day. This stipulation, according to  
5 Defendants, forbade the arbitrator from concluding that there were, in fact material  
6 differences between the September 3 and September 4 versions of the MOA.

7 However, as noted in this Court’s prior order, this issue need not be reached because  
8 the arbitrator’s decision also rested upon an independent rationale: that the MOA was void  
9 for lack of regulatory approval. Defendants now argue that this independent rationale was  
10 not in fact independent, and that the arbitrator’s factual error equally pollutes both holdings.  
11 For the reasons that follow, this argument is not persuasive.

### 12 Analysis

13 Defendants argue that the arbitrator’s failure to accept the parties’ stipulation was an  
14 essential component of his conclusion that the MOA was void for regulatory approval, and  
15 that his error therefore could not be harmless. Defendants direct our attention to the Supreme  
16 Court’s admonition in O’Neal v. McAninch, 513 U.S. 432, 438 (1995): “The inquiry cannot  
17 be merely whether there was enough to support the result, apart from the phase affected by  
18 the error. It is rather, even so, whether the error had substantial influence. If so, *or if one is*  
19 *left in grave doubt*, the [decision under review] cannot stand.”

20 First, O’Neal was a habeas case and had nothing whatsoever to do with arbitration.  
21 Second, even accepting the standard proposed by Defendants, the arbitrator’s decision must  
22 stand, for the alleged error did not have “substantial influence” on the independent holding,  
23 and this court is not left “in grave doubt.”

24 Given the deferential standard afforded to the decisions of arbitrators, this Court  
25 cannot conclude that the disregarded factual stipulation had any substantive impact  
26 whatsoever on the arbitrator’s decision regarding the lack of regulatory approval. The sole  
27 error identified by Defendants concerns the arbitrator’s understanding of when various drafts  
28 of the MOA were provided to certain members of the Tribe. Defendants do not dispute that a

1 variety of drafts of the MOA were in fact produced, and that the final draft was substantially  
 2 different from the earlier drafts. In particular, Defendants do not appear to dispute that  
 3 “Version 3” of the MOA, which was discussed extensively in the arbitrator’s opinion and is  
 4 in this Court’s record at Docket No. 42-2, does in fact differ substantially from the final draft.  
 5 The arbitrator was apparently under the impression that only an early version of the MOA  
 6 had been presented to the Tribe on September 2, but the parties had stipulated that this was  
 7 not the case.

8 The issue of when Version 3 of the MOA, as opposed to the final version, was  
 9 presented to the tribe, is irrelevant to the issue of whether the final version needed regulatory  
 10 approval. The arbitrator explained in his order that to rely on a contract with an Indian Tribe  
 11 with regard to gaming requires, in addition to compliance with the Tribe’s Constitution,  
 12 “approval by the [National Indian Gaming Council] if the contract falls within their  
 13 guidelines.” Dkt. 42-1, at 6. The arbitrator went on a few pages later to discuss a list of  
 14 changes made between Version 3 and the final version, and concluded that “[t]he signed draft  
 15 . . . of September 4, 2007 and the document entitled Version 3 (unsigned) are not the same.  
 16 They are dramatically different, not just in verbage [sic], but in obligations imposed and  
 17 remedies or benefits received.” *Id.* at 9. The arbitrator then explained that these substantive  
 18 changes, and the question of when and if they are disclosed to the Tribe, reveal “the reasons  
 19 for the creation of the National Indian Gaming Commission and IGRA. Whether one agrees  
 20 with the philosophy or positions of these entities or not, they represent the controlling law  
 21 dealing with recognized Indian Tribes on Indian lands when dealing with gaming issues.” *Id.*

22  
 23 These prefatory references to the National Indian Gaming Council, and the fact that  
 24 some contracts require its approval, lead to the arbitrator’s discussion at the end of his order:

25 In the Arbitrator’s opinion, the MOA of September 4, 2007, because of the extensive  
 26 changes and substantial alterations to the Version 3 MOA it should have received  
 27 NIGC approval before it became operative . . . . The signed MOA of September 4,  
 28 2009, is invalid and unenforceable according to the Constitution of the Respondents  
and to the rules and regulations of the National Indian Gaming Commission.

1 Id. at 10 (emphasis added). As reflected here, the arbitrator relied on the series of changes  
2 implemented between Version 3 and the final version to conclude that the final version  
3 “should have received NIGC approval before it became operative.” While Defendants  
4 dispute the issue of when Version 3 was edited, and when it was presented to the Tribe, they  
5 do not dispute that the document entitled “Version 3” and submitted as an exhibit to this  
6 Court is, in fact, different from the final version.

7 Defendants’ primary textual argument relies on the following passage: “If the contrary  
8 is true, i.e. Exhibits 10 and 15 were in front of the [Executive Committee] on September 3,  
9 2007 then the Claimants would be correct in asserting the import of Stipulation No. 44 and  
10 Respondent/Tribe’s argument would/should be dismissed.” Id. at 8. Defendants suggest that  
11 this amounts to the arbitrator admitting that, if in fact the final version of the MOA was in  
12 front of the Executive Committee on September 3—which the parties stipulated to—the  
13 Tribe’s case must be dismissed. However, this is not a reasonable interpretation of the  
14 passage. First, the arbitrator wrote only that, the “argument” should be dismissed, not the  
15 entire case. Given that prior pages focused on a different argument—“[w]hether or not the  
16 General Council or its authorized agents approved the ‘final Draft’ . . . according to the  
17 mandates of the Tribe’s Constitution and By Laws”—it is unreasonable to conclude that the  
18 arbitrator believed that the stipulated fact would have undermined his conclusion on the issue  
19 of regulatory approval. Indeed, it is hard to see how the timing of the various versions could  
20 possibly impact whether the final version required regulatory approval. The issue of  
21 regulatory approval concerns the nature of the contract and whether it is the type of contract  
22 that falls within NIGC’s purview. This analysis is in no way affected by the issue of  
23 whether and when the contract was disclosed to the Tribe.

24 Defendants also note that the arbitrator’s preliminary conclusions indicated that he  
25 rejected the regulatory approval argument, and suggest this undermines his later conclusion  
26 to the contrary. But of course this is the virtue of a preliminary conclusion: it can be  
27 changed. The language in the arbitrator’s final order is unambiguous: “[T]he MOA of  
28 September 4, 2007, because of the extensive changes and substantial alterations to the

1 Version 3 MOA it should have received NIGC approval before it became operative . . . .” Id.  
2 at 10. It is unavailing to now argue that, before he accepted the argument in a final order, the  
3 arbitrator had preliminarily rejected it.

4 Next, Defendants once again dispute the award of attorney’s fees. Defendants suggest  
5 that this Court’s order “overlooks controlling law,” and relies instead on a now-overruled  
6 Eleventh Circuit case, Lifecare Int’l, Inc. v. CD Medical, Inc., 68 F.3d 429, 436 (11th Cir.  
7 1995). Defendants in fact refer to Lifecare as the “linchpin” of this Court’s prior order,  
8 despite the fact that the case is cited once, and only in a footnote. Moreover, Lifecare was  
9 cited as authority for a proposition that has been by no means overruled. As the Ninth  
10 Circuit recently stated, an arbitral award may be vacated only if it is “‘completely irrational’  
11 or ‘constitutes manifest disregard of the law.’” Comedy Club, Inc. v. Improv West Assoc.,  
12 553 F.3d 1277, 1288 (9th Cir. 2009). Despite the fact that the arbitrator did not cite the  
13 proper legal authority for his award of attorney’s fees, his award was neither “completely  
14 irrational” or in “manifest disregard of the law.”

15 As for this Court’s failure to rely on controlling law, Defendants once again fail to cite  
16 any persuasive authority. Defendants first argue that state law cannot support an award of  
17 fees here because “‘the litigated issues involved not basic contractual enforcement  
18 question[s] but issues peculiar to . . . federal law.’” Mot. at 12 (quoting Resolution Trust  
19 Corp. v. Midwest Federal Savings, 36 F.3d 785, 800 (9th Cir. 1993)). However, this is at  
20 heart a contract claim. Defendants initiated this suit for breach of contract, and in fact they  
21 dispute that federal law intervenes to preclude their claim. The contract at issue adopts  
22 California law, which in turn supports an award of fees here. See Lafarge Conseils Et  
23 Etudes, S.A. v. Kaiser Cement & Gypsum Corp., 791 F.2d 1334 (9th Cir. 1986). In fact, the  
24 exception cited in Resolution Trust has been overruled by the Supreme Court. Resolution  
25 Trust cited In re: Fabian as authority for the exception, and Fabian had confined the  
26 exception to issues of federal bankruptcy law. This case was specifically overruled by the  
27 Supreme Court. See Travelers Cas. and Sur. Co. of America v. Pac. Gas & Elec. Co., 549  
28 U.S. 443, 451-52 (2007). There is no authority for proposition that, despite the contract’s

1 adoption California law, the presence of a federal issue precludes an award of attorney's fees  
2 under state law.

3 Defendants also contend that "the Ninth Circuit has held that Cal. Civ. Code § 1717 is  
4 preempted by federal law governing labor arbitration agreements." Mot. at 12. While this is  
5 true, this case does not concern a labor arbitration agreement. Defendants suggest that such a  
6 holding "is logically extended to preemption of § 1717 under the FAA as well." Id.  
7 Defendants neglect to note this Court's prior citation to Lafarge, an FAA case that awarded  
8 fees under § 1717. If indeed the FAA preempted § 1717, Lafarge could not have been  
9 decided as it was.

10 Finally, Defendants contend that because Plaintiff failed to ask for fees at the outset of  
11 arbitration, it waived its opportunity to obtain them. Defendants cite a series of cases, but  
12 none supports their position. For example, U.S. ex rel. Leno v. Summit Const. Co., 892 F.2d  
13 788 (9th Cir. 1989), did not concern a pure failure to request attorney's fees. On the  
14 contrary, the party in that case failed to establish in the trial court an appropriate basis for  
15 jurisdiction. Because the party had only argued for jurisdiction under the Miller Act, which  
16 does not permit an award of fees, the Circuit Court affirmed the district court's decision not  
17 to award fees. Also, as for Port of Stockton v. Western Bulk Carrier KS, 371 F.3d 1119,  
18 1121-22 (9th Cir. 2004), that case concerned a failure to ask for fees before judgment was  
19 entered.

20 While Defendant is correct that Plaintiff did not ask for an award for attorney's fees in  
21 its pleadings, it certainly did request fees once it prevailed. At that point, the arbitrator  
22 awarded them. See Dkt. 42-5 at 16. Defendants have not cited any law to support the  
23 conclusion that a party to arbitration must submit a request for fees in pleadings or other  
24 preliminary paperwork. The contract in conjunction with California law entitled the Tribe to  
25 an award of fees, and through its "Request For Modification of Arbitration Award to Include  
26 Specific Award of Attorneys' Fees," Plaintiff submitted the issue to the arbitrator. While  
27 Defendants are quite right that the arbitrator awarded fees on a flawed theory, and that he  
28 specifically rejected the theory this Court relies upon, it remains the fact that the award of

1 fees was not contrary to law. His decision was neither “completely irrational” nor did it  
2 constitute “manifest disregard of the law.” See Comedy Club, 553 F.3d at 1290. On the  
3 contrary, the arbitrator accidentally provided for a lawful result. Defendants once again butt  
4 their heads against the standard of review: it is simply not enough to point out mistakes made  
5 by the arbitrator.

6 Because Defendants’ arguments were sufficiently addressed in the prior order, and  
7 they raise no substantial new arguments, their motion is DENIED.

8 **IT IS SO ORDERED.**

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10  
11 Dated: June 29, 2010



CHARLES R. BREYER  
UNITED STATES DISTRICT JUDGE